Bank Kerjasama Rakyat Malaysia Bhd v Koperasi Belia Nasional Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO 22M-207–12 OF 2015
AZIZAH NAWAWI J
27 JULY 2016

Civil Procedure — Summary judgment — Action to recover monies loaned — Plaintiff granted defendant loan facility under principle of Bai' al-Inah — Defendant defaulted in instalment payments — Plaintiff terminated agreement and claimed for outstanding sum — Whether there was actual consent to support asset sale agreement — Whether there was breaches of Syariah Advisory Council Circular which rendered asset sale agreement null and void — Whether there was any triable issue — Rules of Court 2012 O 14

The plaintiff and the defendant had entered into asset sale agreement and asset purchase agreement both dated 26 October 2009 based on a Term Finance – i Facility under the principle of *Bai' al-Inah* whereby loan facility for the sum of RM40m was granted to the defendant. The defendant defaulted in the installment payments, hence the plaintiff terminated the agreements and commenced the present action by way of summary judgment pursuant to O 14 of the Rules of Court 2012 to claim from the defendant for the outstanding sum of RM52,216,430.95. The issues raised by the defendant in opposing this application were that: (a) there was no actual consent to support the asset sale agreement; and (b) there were several breaches of the Syariah Advisory Council Circular ('SAC Circular') on the resolution on *Bai' al-Inah* which rendered the asset sale agreement to be null and void.

Held, allowing the plaintiff's application with costs of RM5,000:

(1) Since the defendant had signed the contract as admitted in para 3 of the statement of defence, they had agreed to the terms and conditions stipulated therein. Further, there was no plea of fraud or misrepresentation that had been raised by the defendant. Thus, pursuant to s 10 of the Contracts Act 1950, a contract was valid when both parties had freely consented to enter into the contract, for a lawful consideration and with a lawful object (see paras 17 & 19).

(2) There was nothing in the statement of defence filed by the defendant to plead and/or to declare that the agreements entered between the parties were null and void as these agreements were in breach of the SAC

Circular and/or resolutions. As this was not a pleaded issue, the defendant could not simply raised the same either in the affidavit or in their submission (see para 21).

(3) In any event, the SAC Circular stated that the resolution on *Bai' 'Inah* will only take effect on 1 January 2013. Thus, the said Circular was not applicable to the asset sale agreement executed on 26 October 2009 (see para 29).

(4) The plaintiff's claim for RM52,216,430.95 as at 31 October 2015 was supported by the statement of account pursuant to cl 17 of the asset sale agreement. Thus, the certificate of indebtedness was prima facie evidence of the sum owing. The onus then lay with the defendant to disprove the amount claimed. However, the defendant did not dispute the amount claimed except to state that facilities were not Islamic or non-Syariah compliant. Further, the defendant did not adduce any facts to support its contention. As such, the defendant had failed to raise any triable issue (see paras 31–33).

[Bahasa Malaysia summary

Plaintif dan defendan telah memasuki perjanjian jualan aset dan perjanjian belian aset kedua-duanya bertarikh 26 Oktober 2009 berdasarkan atas *Term Finance – i Facility* di bawah prinsip *Bai' al-Inah* di mana kemudahan pinjaman bagi sejumlah RM40 juta diberikan kepada defendan. Defendan mengingkari bayaran ansuran, maka plaintif menamatkan perjanjian-perjanjian dan memulakan tindakan ini melalui penghakiman ringkas berikutan A 14 Kaedah-Kaedah Mahkamah 2012 untuk menuntut daripada defendan bagi jumlah yang belum dibayar sebanyak RM52,216,430.95. Isu-isu yang dibangkitkan oleh defendan dalam menentang permohonan ini adalah bahawa: (a) tidak terdapat izin sebenarnya untuk menyokong perjanjian jualan aset; dan (b) terdapat beberapa kemungkiran terhadap Pekeliling Majlis Penasihat Syariah ('Pekeliling MPS') atas resolusi ke atas *Bai' al-Inah* yang menyebabkan perjanjian jualan aset menjadi batal dan tak sah.

Diputuskan, membenarkan permohonan plaintif dengan kos sebanyak RM5,000:

(1) Memandangkan defendan telah menandatangani kontrak seperti yang diakui di perenggan 3 pernyataan pembelaan, mereka telah bersetuju kepada terma-terma dan syarat-syarat yang ditetapkan di dalamnya. Selanjutnya, tidak terdapat pli fraud atau misrepresentasi yang dibangkitkan oleh defendan. Oleh itu, berikutan s 10 Akta Kontrak 1950, kontrak adalah sah apabila kedua-dua pihak telah bersetuju dengan bebas untuk memasuki kontrak, bagi balasan sah dan dengan objek sah (lihat perenggan 17 & 19).

(2) Tidak terdapat apa-apa dalam pernyataan pembelaan yang difailkan oleh

defendan untuk memplid dan/atau untuk mengisytiharkan bahawa perjanjian-perjanjian yang dimasuki di antara pihak-pihak adalah batal dan tak sah kerana perjanjian-perjanjian ini memungkiri Pekeliling MPS dan/atau resolusi. Memandangkan ini bukan isu yang diplidkan, defendan tidak dapat dengan senang membangkitkannya sama ada di dalam afidavit atau dalam hujahan mereka (lihat perenggan 21).

(3) Walau bagaimanapun, Pekeliling MPS menyatakan bahawa resolusi ke atas *Bai' 'Inah* hanya akan berkuat kuasa pada 1 Januari 2013. Oleh itu, Pekeliling tersebut tidak beraplikasi kepada perjanjian jualan aset yang dilaksanakan pada 26 Oktober 2009 (lihat perenggan 29).

(4) Tuntutan plaintif bagi RM52,216,430.95 pada 31 Oktober 2015 adalah disokong oleh pernyataan akaun berikutan klausa 17 perjanjian jualan aset. Oleh itu, sijil keberhutangan adalah keterangan *prima facie* jumlah yang terhutang. Beban oleh itu terletak ke atas defendan untuk menyangkal jumlah yang dituntut. Walau bagaimanapun, defendan tidak mempertikaikan jumlah yang dituntut kecuali untuk menyatakan bahawa kemudahan tersebut bukan Islam atau tidak mematuhi hukum Syariah. Selanjutnya, defendan tidak mengemukakan apa-apa fakta untuk menyokong hujahannya. Dengan itu, defendan telah gagal untuk membangkitkan apa-apa isu yang boleh dibicarakan (lihat perenggan 31–33).]

Notes

For cases on action to recover monies loaned, see 2(5) *Mallal's Digest* (5th Ed, 2015) paras 9096–9101.

Cases referred to

Arab-Malaysian Finance Bhd v Siva Subramaniam Appupillai [1999] MLJU 244; [1999] 8 CLJ 23, HC (refd)

Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 MLJ 400; [1992] 1 CLJ 627, SC (refd)

Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor [2006] 2 MLJ 685, FC (refd)

Janagi v Ong Boon Kiat [1971] 2 MLJ 196 (refd)

MK Associates Sdn Bhd v Bank Islam Malaysia Bhd [2015] MLJU 1954; [2015] 6 CLJ 97, HC (refd)

National Company For Foreign Trade v Kayu Raya Sdn Bhd [1984] 2 MLJ 300; [1984] 2 CLJ 220, FC (folld)

RHB Bank Bhd v Tan Swee Long Holdings Sdn Bhd & Ors [2008] 3 MLJ 130; [2008] 10 CLJ 519, HC (refd)

Smallholders Corp Sdn Bhd & Ors v Utusan Transport Sdn Bhd [1995] 4 MLJ 587, HC (refd)

State Government of Perak v Muniandy [1986] 1 MLJ 490, SC (refd)

Legislation referred to

Bank Kerjasama Rakyat Malaysia Berhad (Special Provisions) Act 1978
Central Bank of Malaysia Act 2009 s 59(1)
Co-Operative Society's Act 1993
Companies Act 1965
Contracts Act 1950 ss 10, 13
Rules of Court 2012 O 14 r 2
Sale of Goods Act 1957 ss 31, 32

Asmadi Othman (Nur Athirah Ahmad with him) (Zulpadli Edham) for the plaintiff.
Kiswaty Abdullah (Kiswaty Abdullah & Partners) for the defendant.

Azizah Nawawi J:

APPLICATIONS

[1] This is the plaintiff's application for summary judgment for the sum of RM52,216,430.95 premised on *Term Finance – i Facility* which was granted by the plaintiff to the defendant.

[2] After hearing the parties, this court has allowed the plaintiff's application with costs of RM5,000.

THE SALIENT FACTS

[3] The plaintiff is a cooperative body registered under the Co-Operative Society's Act 1993, and is subject to the Bank Kerjasama Rakyat Malaysia Berhad (Special Provisions) Act 1978. The plaintiff's business includes the business of providing loans.

[4] The defendant is a cooperative registered under the Co-Operative Society's Act 1993 and incorporated under the Companies Act 1965.

[5] Upon an application by the defendant, the plaintiff had approved a *Term Finance – i Facility* under the principle of *Bai' al-Inah* to the defendant vide a letter of offer dated 21 May 2009, subject to such terms and conditions therein, for the sum of RM40,000,000. The said offer was accepted by the defendant in a letter of acceptance dated 29 May 2009.

[6] Pursuant to the *Bai' al-Inah* principles, the asset sale agreement dated 26 October 2009 was signed by both parties whereby the defendant has agreed to buy from the plaintiff Angkasa Raya Development Sdn Bhd shares at the price of RM63,299,527.22.

[7] The parties have also signed the Asset Purchase agreement dated 26 October 2009 whereby the plaintiff has agreed to buy the same asset from the defendant at sum of RM40,000,000.

[8] The purpose of the facility is to provide capital for the personal loans of members of the defendant. Under the agreement between the defendant and its members, any payments of the loans from its members will be collected by the defendant through *Biro Perkhidmatan Angkasa* and paid into the defendant's account with the plaintiff.

[9] Vide a deed of assignment (proceeds) dated 26 October 2009, the defendant had assigned all the payments due from its members to the plaintiff.

[10] Pursuant to cl 8 of the letter of offer dated 21 May 2009, the defendant agreed to repay the facility by way of installment payments. Clause 11 provides the compensation clause (*ta'wid*) and cl 21 is on the events of default, which includes failure to make payment of any principal, finance charges or fees due under the financing documents.

[11] When the defendant defaulted in the installment payments, the plaintiff issued a notice of demand, and eventually terminated the agreement vide a letter dated 5 November 2015 when the defendant continued with the default in the payments of the outstanding sum. The amount claimed in the said letter of demand is RM50,905,539.24 as at 31 October 2015.

THE FINDINGS OF THE COURT

[12] In an application for summary judgment, this court is guided by the principles laid down in *National Company For Foreign Trade v Kayu Raya Sdn Bhd* [1984] 2 MLJ 300; [1984] 2 CLJ 220, where it was stated by the Federal Court as follows:

> ... We think it appropriate to remind ourselves once again that in every application under O 14, the first considerations are (a) whether the case comes within the order and (b) whether the plaintiff has satisfied the preliminary requirements for proceeding under O 14. For the purposes of an application under O 14, the preliminary requirements:
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> (i) the statement of claim must have been served on the defendant;
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> (ii) the defendant must have entered an appearance;
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> (iii) the affidavit in support of the application must comply with the requirements of r 2 of the O 14
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> ... If the plaintiff fails to satisfy either of these considerations, the summons may be dismissed. If however, these considerations are satisfied, the plaintiff will have

established a prima facie case and he becomes entitled to judgment. This burden then shifts to the defendant to satisfy the court why judgment should not be given against him ...

[13] In the present case, the plaintiff had satisfied the preliminary requirements as laid down in the *Kayu Raya*'s case that is:

(a) the statement of claim have been served on been served on the defendant;

(b) the defendant has entered appearance; and

(c) the affidavit in support is in compliance with O 14 r 2 of the Rules of Court 2012.

Therefore, the burden is then shifted to the defendant to satisfy the court why judgment should not be entered against them.

[14] In *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400; [1992] 1 CLJ 627 the Supreme Court held that the duty of a judge does not end as soon as the fact is asserted by one party, or denied or disputed by the other on affidavit. The judge has a duty to reject such assertion or denial if such assertion or denial is equivocal or lacking in precision or is inconsistent with undisputed contemporary documents or is inherently improbable. The court will have to identify the issues of fact or law and to determine whether they are triable.

[15] The first issue raised by the defendant is that there was no actual agreement between the parties to buy the shares of Angkasa Raya Development Sdn Bhd ('the said shares') because the defendant did not have the intention nor the agreement to buy the said shares. Therefore, the defendant submits that there was no actual consent to support the asset sale agreement dated 26 October 2009 and the said agreement is in breach of s 13 of the Contracts Act 1950 which provides that 'Two or more persons are said to consent when they agree upon the same thing in the same sense'.

[16] The defendant also submits that asset sale agreement dated 26 October 2009 was in breach of ss 31 and 32 of the Sale of Goods Act 1957 as there was no intention on the part of the plaintiff to give possession of the said shares to the defendant. Therefore, the defendant submits that asset sale agreement dated 26 October 2009 is null and void as it is in breach of the Contracts Act 1950 and the Sale of Goods Act 1957.

[17] On this issue however, I agree with the plaintiff that since the defendant has signed the contract, they have agreed to the terms and conditions stipulated therein. This is admitted by the defendant in para 3 of the statement of defence

dated 22 January 2016. Therefore pursuant to s 10 of the Contracts Act 1950, a contract is valid when both parties have freely consented to enter into the contract, for a lawful consideration and with a lawful object.

[18] In *Smallholders Corp Sdn Bhd & Ors v Utusan Transport Sdn Bhd* [1995] 4 MLJ 587, the court held that:

> *When documents containing contractual terms are signed, then in the absence of fraud or misrepresentation the party signing it is bound*, and it is wholly immaterial whether he has read the document or not. In this case no plea of fraud or misrepresentation has been raised and the defendant is bound by his own admission.

[19] In the present case, there is no plea of fraud or misrepresentation that has been raised by the defendant and therefore the defendant is bound by its admission in para 3 of the statement of defence dated 22 January 2016 that it has signed the said asset sale agreement dated 26 October 2009.

[20] The next issue raised by the defendant is that there are several breaches of the Syariah Advisory Council ('SAC') Circular on the resolution on *Bai' 'Inah*, and this renders the asset sale agreement dated 26 October 2009 to be null and void.

[21] However, there is nothing in the statements of defence filed by the defendant to plead and/or to declare that the agreements entered between the parties are null and void as these agreements are in breach of the SAC Circular and/or resolutions. As this is not a pleaded issue, the defendant cannot simply raise the same either in the affidavit or in their submission. In *Janagi v Ong Boon Kiat* [1971] 2 MLJ 196, the court held as follows:

> A judgment should be based upon the issues which arise in the suit and if such a judgment does not dispose of the questions as presented by the parties it renders itself liable not only to grave criticism but also to a miscarriage of justice. It becomes worse and is unsustainable if it goes outside the issues. Such a judgment cannot be said to be in accordance with the law and the rules of procedure. It is the duty of the courts to follow the rules of procedure and practice to ensure that justice is done. These rules are meant to be observed and respected.

[22] The only Syariah issue raised by the defendant in the statement of defence dated 22 January 2016 is in para 14, which reads as follows:

> 14. Defendan menafikan Perenggan 14 Pernyataan Tuntutan dan mengatakan seperti berikut:
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> a. Bahawa tuntutan Plaintif di sini bagi mendapatkan bayaran Harga Jualan barangan yang berasaskan Perjanjian Jualan yang tidak sah, terbatal dan tidak berkesan di sisi kontrak dan/atau syariah adalah wajar ditolak oleh Mahkamah yang Mulia ini.

b. Secara alternative, sekiranya Mahkamah yang Mulia ini mendapati Perjanjian Jualan adalah sah, Defendan menyatakan tuntutan Plaintif bagi bayaran secara sekaligus sebanyak RM50,905,593.24 adalah pre-matang kerana Perjanjian Jualan memperuntukkan bayaran Harga Jualan adalah kena dibayar mengikut kalaan sebagaimana yang telah dipersetujui.

c. Bahawa tuntutan bayaran balik sebanyak RM50,905,593.24 dikira setakat 31.10.2015 bagi pinjaman asal sebanyak RM40 juta adalah berasaskan riba yang haram di sisi syariah.

d. Oleh kerana niat pihak-pihak ialah untuk memasuki kontrak patuh syariah, maka tuntutan berasaskan riba yang haram di sisi syariah adalah bertentangan dengan niat untuk memasuki transaksi patuh syariah.

[23] However, in the written submission of the defendant, the defendant claims that the asset sale agreement dated 26 October 2009 has breached the SAC Circular on the resolution on *Bai' al-Inah*, which are as follows:

(a) that there was a breach of the Syariah Advisory Council (SAC) resolution on *Bai' 'Inah*, that there must not be a stipulation in the contract to repurchase the asset;

(b) that there was a breach of the Syariah Advisory Council (SAC) resolution on *Bai' 'Inah*, which stipulates that both buy and sell contract must be concluded at different times. In this case, both agreements are dated 26 October 2009; and

(c) that there was a breach of the Syariah Advisory Council (SAC) resolution on *Bai' 'Inah*, that there must be a valid possession (*qabd*) of the assets in accordance with Syariah practice.

[24] Again as can be seen from statement of defence dated 22 January 2016, in particular para 14, these issues on the specific non-compliance with the SAC Circular and/or resolutions have not been specifically pleaded. As these material facts have not been pleaded in the statement of defence, therefore the defendant simply cannot amplify the same in their affidavits or in their submission (*State Government of Perak v Muniandy* [1986] 1 MLJ 490 (SC)).

[25] In any event, the above resolutions are contained in the Circular on the 'Implementation of Syariah Advisory Council of Bank Negara Malaysia's Resolution on Bai' 'Inah' which was approved by the SAC in its 128th meeting on 25 September 2012. The said Circular was issued pursuant to sub-s 59(1) of the Central Bank of Malaysia Act 2009.

[26] The defendant's complaints are premised on the following provisions of the Circular:

(a) para 6.1.2:

> The sale and purchase *agreements must not stipulate any terms and conditions or create an obligation for both transacting parties to repurchase or resell the subject matter of sale*. Failure to observe this Syariah requirement may render the agreements to be void from Syariah perspective ...

(b) para 6.1.3:

> *The execution or signing of both sets of sale and purchase agreements must be executed at different intervals*. Ex parte execution of both documents simultaneously by any contracting party in *bai' al-Inah* transaction will render the contract to be void from Syariah perspective. In this regard, Bank Negara Malaysia (the Bank) expects IBI to record the time (time stamp) of execution or signing of both documents as evidence of compliance to this Syariah requirements.

(c) para 6.1.5:

> The ownership in the *subject matter of sale in bai' al-Inah transaction must be effectively transferred from the seller to the purchaser*. The transfer of ownership shall result in the purchaser's having absolute rights and control on the asset under permissible mechanism by Syariah and generally accepted trade practices (*'urf tijari*). The purchaser is regarded to have ownership right in the underlying asset through physical possession (*al-qabd al-haqiqi*) or constructive possession (*al-qabd al-huqmi*).

[27] However, without going into the merits of the defendant's complaints, I take note that under para 5.1 of the Circular, it is clearly stated that the effective implementation date of the Circular is *1 January 2013*.

[28] But on the factual matrix of these cases, the parties had entered into the asset sale agreement on 26 October 2009, before the implementation date of the said Circular. In the case of *MK Associates Sdn Bhd v Bank Islam Malaysia Bhd* [2015] MLJU 1954; [2015] 6 CLJ 97, Justice Asmabi dealt with a similar issue, on the application of *ta'width* and held as follows:

> (d) It is not disputed that at the time the agreements were entered into, *Ta'widh* was not practised by the IFI. As reflected in the Bank Negara Malaysia's letter dated 10 December 1998 ('Bank Negara letter' (see exh 'BIMB-1' of encl 6) *Ta'widh* was only introduced after the SAC's resolution in 1998.
>
> (e) The said resolution was to take effect only on 1 January 1999 to existing and new agreements. Therefore, *Ta'widh* shall be applicable only on or after 1 January 1999.

[29] In the present case, the Circular clearly states that the resolution on *Bai' 'Inah* will only take effect on 1 January 2013. Therefore the said Circular is not applicable to the asset sale agreement executed on 26 October 2009.

[30] The plaintiff's claim for RM52,216,430.95 as at 31 October 2015 is

also supported by the statement of account, exh A6. Exhibit A6 is issued pursuant to cl 17 of the asset sale agreement, which states:

> 17. Statement of Account
>
> A statement of account in writing stating the amount payable by the Customer under this Agreement, the Asset Purchase Agreement and the Security Documents and duly certified by the Manager of the Bank or any authorized person thereof shall in the absence of manifest error be conclusive evidence that such amount is in fact due and payable by the Customer to the Bank.

[31] Therefore, pursuant to the case of *Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor* [2006] 2 MLJ 685, I am of the considered opinion that the certificate of indebtedness is prima facie evidence of the sum owing. The onus then lies with the defendant to disprove the amount claimed. However, the defendant did not dispute the amount claimed except to state that facilities are non-Islamic or non-Syariah compliant. In *Arab-Malaysian Finance Bhd v Siva Subramaniam Appupillai* [1999] MLJU 244; [1999] 8 CLJ 23, the court said this:

> The appellant had produced a statement of account showing the amount outstanding. In the light of the conclusive evidence clause in the guarantee, it would not be open for the respondent to dispute the amount as stated by the appellant in the final account.

[32] In the present case, the defendant did not adduce any facts to support its contention. In *RHB Bank Bhd v Tan Swee Long Holdings Sdn Bhd & Ors* [2008] 3 MLJ 130; [2008] 10 CLJ 519, the court held it is not enough for the defendants to merely deny the amount owed 'but the defendants must plead any salient and relevant facts which negative the existence of the debt or which show that the claim is not maintainable on other grounds'.

[33] In the premise, and based on my reasons enumerated above, I find that the defendant has failed to raise any triable issue and the plaintiff's application is allowed with cost of RM5,000.

Plaintiff's application allowed with costs of RM5,000.

Reported by Dzulqarnain Ab Fatar